



Another Federal Appeals Court Rejects Workplace Recording Bans

Insights

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The 5th Circuit Court of Appeals recently became the second federal appeals court this year to hold that an employer's rule prohibiting recording in the workplace violates the National Labor Relations Act (NLRA). In a [July 25 decision](#), the court agreed with the National Labor Relations Board that such a rule could discourage unionizing or other protected activity. This case is yet another reminder that employers need to tread carefully when it comes to personnel policies restricting audio and video recording (*T-Mobile USA, Incorporated v. NLRB*).

T-Mobile's Policies Come Under NLRB Scrutiny

T-Mobile's employee handbook contained four workplace rules that are not necessarily uncommon in today's modern workplace: (1) a rule encouraging employees to "maintain a positive work environment;" (2) a rule prohibiting arguing or fighting, failing to treat others with respect, or failing to demonstrate teamwork; (3) a rule prohibiting access to electronic information by non-approved individuals; and (4) a rule prohibiting all photography and audio/video recording in the workplace without prior permission from management, human resources, or the legal department.

The NLRB was called upon to render judgment on these rules after a challenge was raised by the Communication Workers of America. The Board ruled that all four violated the NLRA because, in its view, they had a chilling effect on employees' exercise of their Section 7 rights to engage in protected, concerted activity with regard to the terms and conditions of employment. The employer appealed the ruling to the 5th Circuit Court of Appeals, which issued its decision late last month.

Appeals Court: Recording Ban Needs To Be Rescinded

On appeal, the 5th Circuit, widely regarded as one of the most employer-friendly appeals courts, disagreed with the Board and found that the first three policies were lawful. But the court enforced that portion of the Board's order holding that the employer's complete ban on photography and recording violated the NLRA. In doing so, the 5th Circuit joined with the 2nd Circuit Court of Appeals, which reached the same conclusion in June as to [a similar workplace recording ban](#).

To reach its conclusion, the 5th Circuit applied the framework set out in the Board's [Lutheran Heritage decision](#) from 2004. Under that framework, the court first looks at whether the rule at issue explicitly restricts Section 7 activities. If the restriction is not explicit, it may still violate the NLRA if employees would reasonably construe the rule to prohibit Section 7 activity, the employer

promulgated the rule in response to union activity, or the employer has applied the rule to restrict the exercise of Section 7 rights.

Since the NLRB did not argue the recording ban explicitly restricted protected activity, was promulgated in response to union activity, or had been applied to restrict the exercise of protected activity, the court's focus was on whether a reasonable T-Mobile employee would reasonably construe the language of the recording rule to prohibit Section 7 activity. The 5th Circuit explained the "reasonable employee" for purposes of its inquiry "is a T-Mobile employee aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA."

Applying the *Lutheran Heritage* test to the first three rules, which the court characterized as "common sense civility guidelines," the court held that a reasonable employee would not construe them to restrict Section 7 activity. Here, the court emphasized the importance of both context when interpreting the rules and the necessity to give such rules a reasonable reading. The question, the court instructed, is not how the reasonable employee *could* interpret these policies, but rather how the reasonable employee *would* interpret them.

The recording ban, on the other hand, troubled the court because of its sheer breadth. Citing the 2nd Circuit's June 2017 decision, the 5th Circuit agreed with the NLRB that a reasonable employee would interpret the ban – which by its plain language encompasses any and all photography and recording without permission – as discouraging protected activity, such as "an off-duty employee photographing a wage schedule on a corporate bulletin board."

The court rejected T-Mobile's argument that the recording rule's stated purposes — "to prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information," — justified the ban. These recitations were not enough to overcome the broad prohibition of protected activity, "including Section 7 activity wholly unrelated to those stated interests." The court declined to decide whether a right to photograph and record the workplace exists under the NLRA, noting that "there are circumstances in which taking photographs or recordings may be protected activity [such as the example of photographing a wage schedule], and . . . T-Mobile has not provided any legitimate reason why its ban ought to be allowed to encompass such activity."

Conclusion: What Should Employers Do?

With two federal appeals courts reaching the same conclusion within a few months about the legality of broad workplace recording bans, it certainly appears that a trend is emerging that impacts your ability to control workplace recordings. If you operate in any of the states covered by the 5th Circuit (Texas, Louisiana, and Mississippi) or 2nd Circuit (New York, Connecticut, and Vermont), you should pay particular attention to this trend. But the larger question remains: should you scrap your anti-recording policies altogether?

Given the fact that most employees bring mobile devices capable of audio and video recording to work on a daily basis, and given the additional fact that disgruntled workers commonly surreptitiously record meetings, discussions, and events, solid arguments can be made for keeping or implementing policies that limit recording in the workplace. But this decision is a reminder – or, for some, a wake-up call – to carefully craft such rules to maximize their enforceability. If you want to ensure your policy walks the fine line between legitimate workplace rule and illegal workplace practices, consult with your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific federal decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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